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Supreme Court, U.S.
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In the Supreme Court of the United States

TERRENCE WASHBURN, PATRICIA WASHBURN, PENELOPE NICOL, Individually and as Trustees of the 727 Realty Trust, THE 727 REALTY TRUST,

Petitioners,

vs.

JERRY SOPER, Individually, and as a partner of SOPER AND TYLER, THE SOPER LAW FIRM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a federal court in a diversity case determine the applicable state law based upon the existing case law from the state's highest court, or does it attempt to determine how the state might rule in light of trends in the case law?

RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption of the case. There are no corporate parties.

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STATEMENT OF JURISDICTION

The Court of Appeals filed its order affirming the judgment of the District Court on February 11, 2003 (1a[1]). A timely petition for rehearing was denied on April 9, 2003 (24a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

735 ILCS 5/13-214. 4.3(b). An action for damages based on tort, contract or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

STATEMENT OF THE CASE

Basis for District Court Jurisdiction

All plaintiffs-petitioners are citizens of the State of Illinois. All defendants-respondents are citizens of the State of Iowa. The amount in controversy exceeded $75,000, exclusive of costs (25a). This case was filed in the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 1332.

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[1] Materials in the Appendix will be designated by their page in the Appendix followed by the letter "a". Documents cited from the record before the Court of Appeals will be designated "C".

Allegations in the Complaint

The plaintiffs-petitioners (hereinafter "petitioners") alleged that defendants-respondents (hereinafter "respondents") were their attorneys in an arbitration proceeding arising out of a dispute concerning a commercial real estate transaction. Petitioners alleged that respondent Soper, in the course of representing them in the arbitration proceeding, breached the standard of care by coercing them into accepting an unreasonably low settlement (26a).

Proceedings in the District Court

Respondents moved for summary judgment, arguing, *inter alia*, that the complaint was barred by the two-year statute of limitations for attorney- negligence found at 735 ILCS 5/13-214.3(b) (C.) Petitioners responded to that aspect of the motion for summary judgment by arguing that the district court should apply the Iowa statute of limitations for attorney negligence.

The district court granted the motion, holding that the Illinois statute applied, and that petitioners knew, or reasonably should have known, of their injury caused by respondent's acts or omissions more than two years before the filing of the complaint against respondents (14a-22a).

Proceedings in the Court of Appeals

Petitioners argued that summary judgment was inappropriate because the most recent decision of the Iowa Supreme Court on choice-of-law between statutes of limitations held that the statute of limitations is procedural, not substantive. Accordingly, an Iowa court would apply the Iowa statute of limitations so long as the Iowa statute barred only the remedy and not the right to sue.

Respondents argued that under the amended version of the Restatement (Second) of Conflict of Laws, §142, the statute of limitations is no longer considered procedural. Respondents argued that the court should consider which state has the more significant relationship to the parties and the occurrence to determine which of the two statutes of limitations to apply.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. The court began its analysis by citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which holds that a district court in a diversity case must determine choice of law issues as would the highest court of the state in which it sits. The court stated that although the most recent pronouncement of the Iowa Supreme Court with respect to choice of law between statutes of limitations was based upon the "procedural vs. substantive/right vs. remedy" distinction, it determined that the Iowa Supreme Court typically follows the current version of the Restatement (Second) of Conflicts of Law in choice-of-law issues in other areas of law. Accordingly, by predicting that the court would follow the contemporary pronouncement of the Restatement, the court affirmed the district court's determination that Illinois bore the more significant relationship to the parties and the occurrence (1a-13a).

Applying the Illinois legal malpractice statute of limitations (735 ILCS 5/13-214.4.3(b)), the court held that there was no genuine issue of material fact concerning the issue of whether plaintiffs knew of their injury and its wrongful causation within two years of the injury. Accordingly, it affirmed summary judgment based upon the Illinois statute of limitations.

Petitioner's petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

THE EIGHTH CIRCUIT'S PREDICTION THAT THE IOWA SUPREME COURT WOULD FOLLOW THE RESTATEMENT INSTEAD OF ITS OWN MOST RECENT PRONOUNCEMENT ON CHOICE OF LAW IS INCONSISTENT WITH THE "ERIE" DOCTRINE.

This Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 68 (1938), sets forth a fairly simple rule: a federal court sitting in diversity jurisdiction will apply the law of the state in which it sits. This includes both its statutory law and the common law of the state. What constitutes the common law of the state is typically determined by referring to the most recent decision of the highest court of the state in which the district court sits.

In the instant case, however, neither the district court nor the court of appeals relied upon the most recent Iowa Supreme Court case to answer the question of whether the Iowa or Illinois statute of limitations would determine if petitioner's action were timely filed in the District Court. Instead, both lower courts predicted that Iowa would apply a newer and different set of choice of law principles than those represented by the most recent pronouncement of the Iowa Supreme Court. The question posed by this petition, therefore, is as follows: is a federal court sitting in diversity supposed to predict changes in the law of the state in which it sits, or apply existing law?

This Court addressed that issue, albeit tangentially, in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956). Justice Douglas' majority opinion held that the court of appeals should apply Vermont state law on remand. The opinion deemed Vermont law settled, with no indication that the court intended to overrule its precedents or that the legislature intended to abandon its longstanding policies (352 U.S. at 205). Justice Frankfurter's concurrence suggested that Vermont law was antiquated and

therefore open to review on remand by the court of appeals (*Id.* at 209-12).

One could argue that the *Bernhardt* majority established a precedent of following the existing law of the state unless the state itself had taken steps to change it. Even if this Court is not willing to go that far, what does not emerge from the debate between the majority and concurring opinions is a clear statement of the standards by which the lower federal courts should resolve this controversy. This essentially invites the lower federal courts to take their own predilections as the law of the state being "followed."

The lower court's decisions in this case, as well as the concurring opinion in *Bernhardt*, implicate the very concerns which underlay Justice Brandeis' opinion in *Erie*. Stemming from the ancient decision in *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842), Justice Brandeis feared that federal judges would implement a "federal common law," resulting in the potential for inconsistent outcomes between state and federal trial courts based upon the accident of diversity. 304 U.S. at 77-79.

This theme carried through to *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Once again, this Court opined that if a federal court sitting in diversity applied the choice-of-law rules of its own selection, the parties stood to obtain a different outcome than if the parties were before a trial judge in state court. *See also, Day & Challoner, Inc. v. Zimmerman*, 423 U.S.3 (1975). ("a federal court in a diversity case is not free to engraft onto . . . state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.") *Id.* at 4.

In the instant case, it is almost certain that had the case been brought in state court, the trial judge would

have applied the most recent decision of the Iowa Supreme Court, since Iowa follows ordinary principles of *stare decisis*. *Cover v. Creamer*, 137 N.W.2d 95 (1965). The most recent Iowa cases concerning choice-of-law in multistate statute of limitations cases hold that the statute of limitations is procedural. *Brooks v. Engel*, 207 N.W.2d 110 (Ia. 1973). Accordingly, Iowa will apply its own statute of limitations so long as it bars only the remedy, and not the right to sue. *Harris v. Clinton Corn Processing*, 360 N.W.2d 812 (1985).[2]

Nonetheless, the Eighth Circuit looked to other choice-of-law cases which had been before the Iowa Supreme Court in areas other than conflicting statutes of limitations. The Court correctly noted that the Iowa Supreme Court had followed the Restatement (Second) with respect to those areas of the law. *See Gabe's Const. Co. v. United Capital Ins. Co.*, 539 N.W.2d 144 (1995) (insurance cases); *Marriage of Whelchel*, 476 N.W.2d 104 (1991) (marital property division).

This petition for certiorari is neither the time nor the place to argue that although there are similarities between the conflict of law analyses concerning substantive areas of law and conflicting statutes of limitations, there are significant differences. The point petitioners seek to make is simpler: it is not for a federal court sitting in diversity to apply a different standard than would an inferior court of the state in which it sits.

The limitations upon the authority of lower federal courts to "update" the decisions of the state courts in

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[2] Because the Eighth Circuit did not apply the Iowa statute of limitations, there has never been a decision on the question of whether that statute bars the right or remedy involved in this case, or whether the underlying malpractice action was timely in light of the Iowa statute. Presumably, if this Court reverses, those issues will be addressed on remand.

which they sit has been addressed by at least two circuits. In *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14 (1st Cir. 1976), the court stated "*Erie* calls upon us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it (544 F.2d at 15)". In *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783, (4th Cir. 1995), the court held that *Erie* calls upon the court to apply state law as it exists, rather to suggest or surmise its expansion.

At the very least, accepting certiorari in this case could lead to the setting of a standard for a federal court considering going beyond the latest pronouncement of a state's highest court. If this Court favors, for want of a better term, a "state's rights" approach, it could hold that a federal court can do nothing more than apply the most recent decision of the highest court of the state in which it sits. On the other hand, if this Court chooses to be more deferential to the prognostication prowess of the lower federal courts, it can set a standard for going beyond the latest pronouncement of a state's highest court. Some examples might include "clear indication of an impending change" or "substantial evidence of a change."

However, there is no definitive current standard under which lower federal courts should determine when to depart from established state law in favor of a perceived trend in the law. The lack of certitude in the law leaves federal courts far too free to act as lawmaking (and difference-making) entities merely because the parties chose a federal forum. That is contrary to the spirit of *Erie*.

It has been 65 years since this Court decided *Erie*. In that span, this Court has struggled with choice of law issues arising out of diversity jurisdiction in several well-known contexts. *See, e.g., Guaranty Trust Co. v. York,* 326 U.S. 99 (1945); *Hanna v. Plumer*, 380 U.S. 460 (1965). However, beyond the internal debate in *Bernhardt*, this

Court has never dealt with the question of how to proceed when the lower federal court or courts think the highest court of the state whose law is being applied will not ultimately adhere to its latest pronouncement of the law of the state. The instant case, which involves settled law on one side and a trend in the law on the other, presents a perfect opportunity to clarify the standards by which lower federal courts can choose not to follow the most recent decision of a state's highest court.

CONCLUSION

For these reasons, Petitioners respectfully request that this Honorable Court grant their petition for a writ of certiorari, reverse the judgment of the United States Court of Appeals for the Eighth Circuit, and remand for further proceedings.

Respectfully Submitted,

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